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No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1953

WILLIAM J. OTTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT STATED IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 719

WILLIAM J. OPPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 766-772) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1954 (R. 765). The petition for a writ of certiorari was filed on April 24, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the verdict as to petitioner was rendered defective by the fact that a juror expressed some hesitancy as to his verdict when first polled as to a codefendant but on being pressed for an affirmative answer agreed that the verdict was his.

2. Whether such juror may impeach his verdict by affidavit setting forth his motivation in voting for a verdict of guilty.

3. Whether admissions made in a voluntary statement denying guilt, which statements are corroborated by other circumstances, may be considered in proof of the *corpus delicti*.

4. Whether the trial court's admission in evidence of a codefendant's confession constituted reversible error where the court instructed the jury meticulously both at the time of admission and in its final charge that the confession was admissible only against the codefendant.

STATUTE INVOLVED

18 U.S.C. 281 provides in pertinent part:

> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department of agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which

the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

* * * * *

STATEMENT

The first four counts of a five-count indictment returned in the United States District Court for the Southern District of Ohio charged federal employee Robert C. Hollifield, Sr., as principal, and petitioner William J. Opper, as an aider and abettor, with receiving and agreeing to receive compensation for services rendered in connection with purchase requests and contracts pending before the Department of the Air Force of the United States, in violation of 18 U.S.C. 281 (R. 1-6). Count one charged an agreement by Hollifield on or about October 1, 1950 to receive $1,750 (R. 1-2); count two, a receipt by Hollifield from petitioner of $50 on or about March 1, 1951, in Dayton, Ohio (R. 2-3); count three, a similar receipt of $250 on or about March 1, 1951 (R. 3-5); count four, a similar receipt of $200 on or about August 5, 1951 (R. 5-6). Count five charged a conspiracy between Hollifield and petitioner from October 1, 1950, until about September 26, 1951, to violate 18 U.S.C. 281 (R. 6-10).

The evidence may be summarized as follows:

During the period covered by the indictment,

Hollifield was Chief of the Land Survival Unit at Aero Medical Laboratory, at the Wright Air Development Center in Dayton, Ohio. As designer supervisor of aviation clothing and land survival equipment, he prepared the specifications for survival kits. (Gov. Exs. 14 and 15, RE 49-51;[1] R. 88-89.) Petitioner, who was engaged in the toy, novelty and war surplus business in Chicago, Illinois, supplied prime contractors, including S. Buchsbaum & Company of Chicago, with goggles which were used in the survival kits purchased by the Air Force (R. 137-138, 143, 161, 162, 601).

On January 8, 1951, S. Buchsbaum & Company submitted samples of petitioner's goggles to the Air Force at Dayton requesting permission to use them in the survival kits under its contracts with the Government (Gov. Exs. 22 and 23, RE 73-75; R. 138-140, 163). After testing the goggles, the Aero Medical Laboratory on January 23, 1951, recommended rejection of the goggles because of "marked deviations" from specifications (Gov. Ex. 27, RE 80; R. 374-377). Hollifield called the officer in charge of the testing (R. 377) and arranged a conference which he, together with petitioner and some members of the Aero Medical Laboratory personnel, attended (R. 378-379). At this conference, Hollifield urged that the goggles be accepted and was advised to prepare a memorandum setting forth his reasons therefor (R. 378). He prepared and

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[1] The designation "RE" refers to volume III of the record which contains the exhibits. The pagination of this volume does not follow consecutively that of volumes I and II.

initialed such a memorandum in which he requested the reconsideration of the use of the goggles, "although not in accordance with the current specification," on the grounds that these goggles were immediately available and were $2.55 less than those conforming to the specifications which would have to be specially manufactured for this purpose (Gov. Ex. 28-a, RE 81; R. 379-380). On the basis of this memorandum, petitioner's goggles were approved on February 3, 1951 (Gov. Ex. 28-b, RE 82; R. 380-382), and S. Buchsbaum & Company was informed that the goggles could be used in survival kits which it was preparing for the Air Force (Gov. Ex. 24, RE 76).

Thereafter, on April 13, 1951, from his residence Hollifield telephoned petitioner at his residence in Chicago (Gov. Ex. 46, RE 109; R. 415-416) and the next day Hollifield flew to Chicago (Gov. Ex. 49, RE 112; R. 420-421). On April 13, petitioner drew a check for $1,000 which he cashed on April 16, 1951 (R. 425-427).

Petitioner was questioned by the F. B. I. on October 10, 1951 (R. 320-321). He was told that anything he said might be used against him (R. 319). When asked whether he had given money to Hollifield for any purpose, he stated that he wished to consult an attorney before discussing the subject any further (R. 321). On October 12, 1951, he orally admitted that he had given Hollifield $1,200, first $1,000 in currency and then $200. He said that Hollifield, with whom he had become

friendly, had said that he was about to lose his home, and that the money had been given as a loan although petitioner did not of his own knowledge know that Hollifield had a home. (R. 323-324.) Petitioner did not have any receipt or record to evidence the loan (R. 323). On October 16, petitioner gave the F.B.I. a signed statement setting forth the facts orally admitted on October 12 (R. 325-326, Gov. Ex. 41, RE 101-102).[2]

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[2] Petitioner's written statement reads in full as follows (Gov. Ex. 41, RE 101-102):

"I have been asked to submit a statement relating to my so-called dealings with Robert Holafield [sic].

"In the winter of 1950, as best I can recall, I was at Dayton, Ohio then visiting with the firm of Cappel & MacDonald & Company with whom I had numerous business transactions. At the office of this firm I met Mr. Holafield and in a discussion about things made for the armed forces, Mr. Holafield then stated that the next time I was in Dayton to visit him at Wright Field. Sometime later I went to Wright Field and saw Mr. Holafield and had a social visit with him. We discussed no particular matters of any kind. Sometime later when I visited Mr. Holafield at Wright Field I discussed with him the possibility of making a wrist compass that was being required by the armed forces as well as using my ¾ inch compass in any future kit. While there I saw photographs of numerous items being used and some of the items seen by me I recognized as items that I furnished to prime-contractors.

"Sometime in the spring of 1951 I learned about an objection to a goggle and decided while in Dayton, Ohio visiting Cappel & MacDonald & Company to discuss the matter with Mr. Holafield. At that time Mr. Holafield stated that he did not know what objection was being made and that if I care to know specifically what that objection was to talk with someone in the optical department. Mr. Holafield and myself then went to the optical department and I tried to learn what specific objection was being made and was informed that there was some slight difference in the lense specification.

"I wish to be understood that at no time had I requested Mr. Holafield to do anything on my behalf. I was making no sale to the government as my sales were at all times confined to prime-contractors, who I understand obtain approvals.

The trial court also admitted in evidence sworn statements which Hollifield made voluntarily after being fully advised as to his rights (Gov. Exs. 36, 37 and 38, RE 96-100; R. 256-259) and his testimony before the grand jury which returned the instant indictment (R. 296, 299-316).[3] This evidence showed that in January, 1951, Hollifield accepted petitioner's offer to pay him $1,750 if he would secure approval of petitioner's goggles for the survival kits and that petitioner paid Hollifield in cash $50 in February or March, 1951; $200 in April, 1951; $1,000 about April, 1951; $200 in August, 1951; and $100, date unknown (Gov. Exs.

"Sometime in the early part of 1951 Mr. Holafield had been in Chicago and our respective families visited socially. Sometime in April, as best I can recall, Mr. Holafield communicated with me and indicated that he was hard pressed financially and although I felt no moral or legal obligation to Mr. Holafield in any manner I indicated to him that if I could help him I would try to do so. When he visited Chicago he called upon me and stated that the reason for his financial distress was that he had to meet a mortgage on his home of approximately $1,200.00. Being mindful of the fact that I could help him financially and being charitable I gave Mr. Holafield $1,000.00 which he promised to repay when he was financially able to do so and a few weeks later gave him $200.00. I realize now the foolishness of my act but had no motive in so doing except in making him a loan."

Although it is not clear from the record whether he consulted an attorney before October 16, on October 29, 1951, in response to further F.B.I. requests for written statements, petitioner declined by saying that his attorney did not feel it was necessary (R. 349-350).

[3] Immediately preceding the introduction of this evidence (R. 319-320, 331) and again in its final charge to the jury (R. 721-722), the court emphatically and repeatedly instructed the jury that petitioner's conversations with and statement to the F.B.I. were to be considered only in connection with petitioner's guilt and not Hollifield's.

37 and 38, RE 97-100; R. 303, 304, 305, 306, 308-309, 313, 314-315).[4]

The court admitted such evidence *in toto* over petitioner's objection that his name be deleted in all such evidence (R. 246), but at the same time the court admonished and instructed the jury that it was admitted against Hollifield only (R. 260-267, 268-269, 290). The final instructions of the court in respect of this evidence were as follows (R. 721-722):

> In this connection, however, I desire to call your attention to the following: There has been introduced in evidence through various witnesses, statements that were made on various occasions; some by the defendant Hollifield and some by the defendant Opper. There is in evidence the oral testimony of certain wi[illegible]s as to what these statements were. In addition to this oral testimony there are now in evidence three documents marked Government's Exhibits 37, 38 and 41.
>
> Exhibits 37 and 38 are written statements, signed by the defendant Hollifield. Exhibit 41 is a written statement signed by the defendant Opper.
>
> I have heretofore instructed you during the progress of the trial, as forcibly as I know how, but I repeat here that anything that de-

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[4] The grant jury testimony indicated that Hollifield received a total of $1,550 (R. 315) while his statements to the F.B.I. and O.S.I. show that he received only $1,200 (Gov. Exs. 37 and 38, RE 97-100).

> fendant Hollifield may have said or written about himself in connection with the transactions here under consideration in the various counts of the indictment, you may consider as evidence against the defendant Hollifield, but you must not consider such statements as evidence against the defendant Opper.

Petitioner was found guilty on all counts. He was sentenced to consecutive terms of imprisonment of two years on count 1 and one year on count 4; to fines of $500 each on counts 2 and 3; and to a term of imprisonment of one year and one day on count five, this sentence to run concurrently with the sentences imposed on counts 1 and 4. (R. 20, 29.)

On appeal, the Court of Appeals affirmed the judgment of conviction on counts 1, 4 and 5 and reversed on counts 2 and 3 on the ground that there was no competent evidence against petitioner to establish the specific payments charged in the reversed counts (R. 765, 772).

ARGUMENT

1. After the written verdicts of guilty were read by the Clerk, defense counsel requested a poll (R. 740). The court thereupon read the verdicts and asked the jury as a body as to petitioner and co-defendant separately "Is this your verdict." In each case the jury as a body replied affirmatively.

When the jury was polled individually as to Hollifield, each of the jurors but Marker replied promptly that the verdict was his (R. 741, 743).

As to juror Marker, the following occurred (R. 741-743):

The CLERK: Raymond Marker, is this your verdict as to Robert G. Hollifield?

Mr. MARKER: I signed the paper.

The COURT: No. That is not the answer. Is that your verdict? Say yes or no.

Mr. MARKER: I guess it is.

The COURT: That is not the answer. The question is, is that your verdict. You may say yes or no.

Mr. KELLEY [Defense counsel]: If your Honor please, the defense moves that this jury be sent back for further deliberation, sir.

The COURT: You may answer the question, Mr. Marker, whether that is your verdict, yes or no.

Mr. MARKER: Yes, I guess.

The COURT: Mr. Marker, will you answer the question? Please state whether or not that is your verdict as to Robert Hollifield. Answer it yes or no.

Mr. MARKER: (Hesitates) Can't I say "I guess"?

The COURT: No, Mr. Marker, you can't say "I guess". You will have to say—you are being polled now and the question is whether or not this is your verdict. You must say, "Yes, it is" or "No, it is not", whichever you see fit to say. It must be one or the other. You can't guess at it.

Mr. KELLEY: In justice name——

The COURT: Pardon me, Mr. Kelley. I am running this Court. Please be seated. You

answer the question yes or no, Mr. Marker, as you see fit. That is up to you.

Mr. MARKER: Yes.

The COURT: All right. Go to the next juror.

Mr. KELLEY: May the record show the time that has taken place before this Gentleman expressed himself?

The COURT: The record may show anything you please.

Mr. KELLEY: May the record show many minutes passed?

The COURT: I wanted to know from Mr. Marker whether this was his verdict and he said: "Yes, it is."

Mr. KELLEY: May the record show before he responded many minutes passed and may it show that the juror has bent his head in great perturbation? May the record show that the juror is now in tears?

When subsequently polled individually as to petitioner, the jury unanimously and promptly replied affirmatively (R. 743-745) with Marker saying (R. 743): "I said it once. Yes, yes it is."

There can be no doubt on this record, that Marker had actually reached the verdict of guilty. As we discuss below, that fact is not negatived even by the affidavits subsequently submitted by Marker. The judge made it perfectly clear that he merely wished the juror to take a stand as to whether the verdict was or was not his. The court's insistence on an affirmative answer was not coercion to acquiesce in any particular verdict; it was merely to determine whether the jury had in

fact reached a unanimous verdict. As such it was not only proper, but necessary. Thus the facts of this case are very different from the cases on which petitioner relies (Pet. 13-17) in none of which was it clear that, at the time the jury was polled, the juror did state that the verdict was his. Manifestly, if there was agreement, as there clearly was in this case, there was no reason to send the jury back to reach an agreement. It should be noted particularly that when juror Marker was polled on the verdict with respect to petitioner, he made only the flat statement that he joined in that verdict. Moreover, this was a matter clearly within the discretion of the trial judge who had the advantage of observing the juror in concluding that he genuinely joined in the verdict.

2. In connection with his motion for a new trial, petitioner submitted an affidavit by Marker and a supplement thereto (R. 21-25, 749-750) in which Marker alleged that the verdict of guilty against petitioner was not his in that: (1) in the jury room just prior to returning to the courtroom he changed his original acquittal verdict to that of guilty because other jurors indicated that he might be motivated by corrupt reasons in voting for acquittal and (2) while being polled, he wanted to say that the guilty verdict was not his "conscientious" verdict, but he was afraid that the court would either censor him or hold him in contempt (R. 24-26). The court denied the motion and ordered the affidavits stricken from the record (R. 756) on the ground, *inter alia*, that (R. 755):

> It has been held many, many times—so often that it is not worthy of the citation of authority, that the verdict of a jury cannot be later set aside because of some subsequent comment or affidavit of a juror as to what took place, either in the jury room or elsewhere.

We submit that the trial court was correct. Significantly, these allegations themselves do not tend to show that Marker did not knowingly and conscientiously vote for a guilty verdict. The rule is clear, not only that a juror cannot impeach a verdict which, like the one here, was unmistaken and unambiguous, but that under no condition is impeachment allowed to show a juror's motivation in joining in the verdict, as petitioner attempts to do.[5] *McDonald* v. *Pless*, 238 U. S. 264, 267-269; *Mattox* v. *United States*, 146 U. S. 140; *Freid* v. *McGrath*, 135 F. 2d 833 (C. A. D. C.); 8 Wigmore on *Evidence*, 3rd ed., Sections 2348 and 2349.

3. Petitioner contends (Pet. 17-20) that his statements to the F. B. I., *supra*, pp. 5-7, were inadmissible on the ground that they did not meet the minimum requirements of the least stringent rule requiring corroboration of confessions by independent proof of the *corpus delicti*. Underlying that contention is the assumption, which the court below rejected (R. 771), that the statements were confessions. The court held that such statements,

[5] Furthermore, the accuracy of Marker's allegation that he was afraid to speak out when being polled because of possible censor by the court is doubtful in view of the complete ease with which he twice successfully requested the court to adjust the trial schedule to his convenience (R. 497-498, 730-731).

being denials rather than acknowledgments of guilt, were "not confessions" and hence "Decisions upon the admissibility of confessions have no bearing upon the admissibility of appellant's statements" (R. 771). We submit that an examination of the underlying principles of the corroboration-confession rule and the authorities clearly support the holding below.

The fundamental purpose of the rule requiring corroboration of confession is to guard against convictions based upon untrue confessions alone. *Warszower* v. *United States*, 312 U. S. 342, 347; *United States* v. *Markham*, 193 F. 2d 574, 576 (C. A. 2). Judicial experience has shown that confessions may be untrustworthy because of the possibility that promises or threats have induced the accused to declare his guilt. 3 Wigmore on *Evidence* (3rd ed.) Section 822; *Forte* v. *United States*, 94 F. 2d 236, 238-239 (C. A. D. C.). But where, as here, the statement is a denial of guilt, the accused obviously was not acting under such pressures. Hence, such a statement is not subject to the same unreliability as a confession and for that reason does not require corroboration. See *Warszower* v. *United States, supra*, at p. 347, where this Court rejected the application of the corroboration rule to admissions made prior to the commission of the crime because such statements contained "none of the inherent weaknesses of confessions." This statement also contains no such inherent weaknesses.

The distinction between inculpatory and excul-

patory statements has generally been recognized by the courts, even by those which follow the strict confession-corroboration theory. *Morton* v. *United States*, 147 F. 2d 28, 31-32 (C. A. D. C.), certiorari denied, 324 U. S. 875; *Ercoli* v. *United States*, 131 F. 2d 354, 356 (C. A. D. C.); *Dimmick* v. *United States*, 116 Fed. 825 (C. A. 9); Wigmore, *ibid.*, Sec. 821; see also *Perovich* v. *United States*, 205 U. S. 86, 91; *Wilson* v. *United States*, 162 U. S. 613, 621-622; *Ballew* v. *United States*, 160 U. S. 187, 193; cf. *Bram* v. *United States*, 168 U. S. 532, 541-543.

It should be noted that we are dealing here only with that aspect of the rule of corroboration which relates to corroboration by independent evidence of the *corpus delicti*. There can be no doubt that the independent evidence of meetings between Hollifield and petitioner, the benefit which Hollifield secured for petitioner, the telephone call from the Hollifield residence to the Opper residence, and the $1,000 check drawn by petitioner on April 13 and cashed on April 16, 1951, all tend in general to corroborate petitioner's admissions of payment. There is thus in this case no issue as to whether a person can be convicted on his own statements without independent proof of any kind. The question is merely whether the independent proof sufficiently tends to show the elements of the specific crimes charged. We believe that the independent facts detailed above suggest the existence of a corrupt agreement between petitioner and Hollifield and the transfer of money sufficiently to satisfy the rule adopted in *Forte* v. *United States*, 94 F. 2d 236

(C. A. D. C.) and other cases cited by petitioner, since it is established that the independent proof of the *corpus delicti* need not in itself be sufficient to establish the crime. See cases cited in the *Forte* opinion, pp. 240-243. But we do not need to resolve that factual issue here. We think it is clear that exculpatory statements, made under the circumstances here proved, do not come within the reason of the rule requiring independent corroborative evidence of the *corpus delicti*, and, therefore, that affirmance of the conviction was clearly correct.

4. Although acknowledging that the codefendant's statements were admitted under the safeguarding instructions which the courts have held sufficient, petitioner argues (Pet. 20-21) that the results in this case show that the safeguards were insufficient since, as the court below found, the only evidence connecting petitioner with the specific payments charged in counts 2 and 3 were the statements of Hollifield. But the fact that error may occasionally occur in the operation of a rule does not mean that the rule is wrong. This is obviously a case in which it was proper to try the two defendants together, and, manifestly, it was proper to admit against each statements which he had voluntarily made. The judge carefully instructed the jury as to the limited use of the codefendant's testimony, and the error that may have resulted from failure to follow that instruction has been cured by the Court of Appeals. There is thus no question warranting review.

Petitioner's further statement that the Court of

Appeals compounded the error is unwarranted. The affirmance by the court below does not show any inabiiity on the part of the court below to properly limit the Hollifield confession. As already shown above, independent proof of the *corpus delicti* was not necessary in this case and the court below affirmed the convictions only after so holding. Its reversal on counts 2 and 3 clearly demonstrated its complete comprehension of the limitation on the use of Hollifield's statements.

CONCLUSION

The case involves only the application of settled principles and presents no questions requiring further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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